

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOE E. SHARP,)
Plaintiff,) No. CV-07-3037-CI
v.) ORDER GRANTING PLAINTIFF'S
MICHAEL J. ASTRUE,) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND REMANDING FOR ADDITIONAL
Security,) PROCEEDINGS PURSUANT TO
Defendant.) SENTENCE FOUR 42 U.S.C. §
405(g)

)
)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 23, 26.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David M. Blume represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 9.) On March 21, 2008, Plaintiff filed a reply. (Ct. Rec. 28). After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

On August 29, 2003, and September 2, 2003. Plaintiff Joe Sharp
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1 (Plaintiff) protectively filed for supplemental security income
2 benefits (SSI) and disability insurance benefits (DIB). (Tr. 53-55,
3 421-424.) Upon initial application, Plaintiff alleged disability
4 due to degenerative joint disease, back pain, depression and post-
5 traumatic stress disorder, with an alleged onset date of October 1,
6 1996. (Tr. 53, 74.) Benefits were denied initially and on
7 reconsideration. (Tr. 28-30, 33-34, 426-430, 432-434.) Plaintiff
8 requested a hearing before an administrative law judge (ALJ), which
9 was held before ALJ Riley J. Atkins on September 21, 2006. (Tr.
10 441-477.) Plaintiff, who was present and represented by counsel,
11 and vocational expert Kay Wise, testified. The ALJ denied benefits
12 and the Appeals Council denied review. (Tr. 6-8.) The instant
13 matter is before this court pursuant to 42 U.S.C. § 405(g).

14 **STATEMENT OF THE CASE**

15 The facts of the case are set forth in detail in the transcript
16 of proceedings, and are briefly summarized here. Plaintiff was 36
17 years old at onset and 46 at the time of the decision. (Tr. 21,
18 23.) He has approximately a tenth-grade education. (Tr. 312, 443.)
19 He testified he had past work experience as a house painter. (Tr.
20 468.) Plaintiff testified that he has not consumed alcohol or non-
21 prescribed drugs for about three years. (Tr. 449.)

22 **ADMINISTRATIVE DECISION**

23 ALJ Atkins found Plaintiff met the insured status requirements
24 for DIB through June 30, 2000. (Tr. 13, 15.) At step one of the
25 sequential evaluation, the ALJ found Plaintiff had not engaged in
26 substantial gainful activity since the onset date of October 1,
27 1996. (Tr. 15.) At steps two and three, he found Plaintiff

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1 suffered from the severe impairments of degenerative disc disease
 2 with mild spondylosis and a history of scoliosis, dysthymic
 3 disorder, antisocial personality disorder, and polysubstance
 4 dependence in sustained full remission (Tr. 15), but these
 5 impairments alone or in combination did not meet or equal one of the
 6 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations
 7 No. 4 (Listings). (Tr. 16.) ALJ Atkins found Plaintiff not fully
 8 credible. (Tr. 18-21.) At step four, he determined Plaintiff had
 9 the following residual functional capacity (RFC) to perform a range
 10 of medium work:

11 [The claimant] is able to lift and/or carry 50 pounds
 12 pounds occasionally and 25 pounds frequently. He is able
 13 to stand and/or walk 6 hours during a fulltime 8-hour
 14 workday. He is able to sit 6 hours during a fulltime 8-
 hour workday. He is able to understand and perform
 simple, routine and repetitive work involving little
 contact with the general public.

15 (Tr. 17.)

16 At step four, based on vocational expert testimony, the ALJ
 17 determined Plaintiff could not perform his past relevant work as a
 18 house painter. (Tr. 21.) At step five, the ALJ again relied on the
 19 VE's testimony and determined that there are other jobs Plaintiff
 20 can perform. (Tr. 22.) Therefore, Plaintiff was not found
 21 "disabled" as defined in the Social Security Act at any time through
 22 the date of the ALJ decision. (Tr. 23.)

23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 25 court set out the standard of review:

26 A district court's order upholding the Commissioner's
 27 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 28 Commissioner may be reversed only if it is not supported

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1 by substantial evidence or if it is based on legal error.
 2 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 3 Substantial evidence is defined as being more than a mere
 4 scintilla, but less than a preponderance. *Id.* at 1098.
 5 Put another way, substantial evidence is such relevant
 6 evidence as a reasonable mind might accept as adequate to
 7 support a conclusion. *Richardson v. Perales*, 402 U.S.
 8 389, 401 (1971). If the evidence is susceptible to more
 9 than one rational interpretation, the court may not
 10 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

11
 12 The ALJ is responsible for determining credibility,
 13 resolving conflicts in medical testimony, and resolving
 14 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 15 Cir. 1995). The ALJ's determinations of law are reviewed
 16 *de novo*, although deference is owed to a reasonable
 17 construction of the applicable statutes. *McNatt v. Apfel*,
 18 201 F.3d 1084, 1087 (9th Cir. 2000).

19 **SEQUENTIAL PROCESS**

20 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 21 requirements necessary to establish disability:

22 Under the Social Security Act, individuals who are
 23 "under a disability" are eligible to receive benefits. 42
 24 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 25 medically determinable physical or mental impairment"
 26 which prevents one from engaging "in any substantial
 27 gainful activity" and is expected to result in death or
 28 last "for a continuous period of not less than 12 months."
 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 from "anatomical, physiological, or psychological
 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

29 In evaluating whether a claimant suffers from a
 30 disability, an ALJ must apply a five-step sequential
 31 inquiry addressing both components of the definition,
 32 until a question is answered affirmatively or negatively
 33 in such a way that an ultimate determination can be made.

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1 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 2 claimant bears the burden of proving that [s]he is
 3 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 4 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

5 It is the role of the trier of fact, not this court, to resolve
 6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 7 supports more than one rational interpretation, the court may not
 8 substitute its judgment for that of the Commissioner. *Tackett*, 180
 9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 10 If there is substantial evidence to support the administrative
 11 findings, or if there is conflicting evidence that will support a
 12 finding of either disability or non-disability, the finding of the
 13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 14 1230 (9th Cir. 1987). Nevertheless, a decision supported by
 15 substantial evidence will still be set aside if the proper legal
 16 standards were not applied in weighing the evidence and making the
 17 decision. *Brawner v. Secretary of Health and Human Services*, 839
 18 F.2d 432, 433 (9th Cir. 1988).

19 Plaintiff has the burden of showing that drug and alcohol
 20 addiction (DAA) is not a contributing material factor to disability.
 21 *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). The Social
 22 Security Act bars payment of benefits when drug addiction and/or
 23 alcoholism is a contributing factor material to a disability claim.
 24 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v. Callahan*, 143
 25 F.3d 1240, 1245 (9th Cir. 1998). If there is evidence of DAA and the
 26 individual succeeds in proving disability, the Commissioner must
 27 determine whether the DAA is material to the determination of
 28

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1 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds
2 that the claimant is not disabled, then the claimant is not entitled
3 to benefits and there is no need to proceed with the analysis to
4 determine whether alcoholism or drug abuse is a contributing factor
5 material to disability. However, if the ALJ finds that the claimant
6 is disabled and there is medical evidence of drug addiction or
7 alcoholism, then the ALJ must proceed to determine if the claimant
8 would be disabled if he or she stopped using alcohol or drugs.
9 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

10 **ISSUES**

11 The question is whether the ALJ's decision is supported by
12 substantial evidence and free of legal error. Specifically,
13 Plaintiff assigns error to the ALJ's evaluation of the medical
14 evidence.

15 **DISCUSSION**

16 **A. Weighing Medical Evidence**

17 Plaintiff alleges that the ALJ erred by failing to properly
18 weigh the opinion of treating physician Judy Richardson, M.D. (Ct.
19 Rec. 24 at 15-20.) The Commissioner responds that the ALJ's
20 determinations should be affirmed because they are based on
21 substantial evidence and free of legal error. (Ct. Rec. 27 at 6-
22 11).

23 In social security proceedings, the claimant must prove the
24 existence of a physical or mental impairment by providing medical
25 evidence consisting of signs, symptoms, and laboratory findings; the
26 claimant's own statement of symptoms alone will not suffice. 20
27 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
28

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1 the basis of a medically determinable impairment which can be shown
 2 to be the cause of the symptoms. 20 C.F.R. § 4416.929. Once
 3 medical evidence of an underlying impairment has been shown, medical
 4 findings are not required to support the alleged severity of the
 5 symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341, 345 (9th Cir. 1991).

6 A treating or examining physician's opinion is given more
 7 weight than that of a non-examining physician. *Benecke v. Barnhart*,
 8 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
 9 physician's are not contradicted, they can be rejected only with
 10 "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830
 11 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion if
 12 he states specific, legitimate reasons that are supported by
 13 substantial evidence. See *Flaten v. Secretary of Health and Human*
 14 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995). In addition to medical
 15 reports in the record, the analysis and opinion of a non-examining
 16 medical expert selected by the ALJ may be helpful to the
 17 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)
 18 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989)).
 19 Testimony of a medical expert may serve as substantial evidence when
 20 supported by other evidence in the record. *Id.*

21 Physical impairments

22 Plaintiff alleges the ALJ erred by failing to discuss the
 23 opinion of treating physician Judy Richardson, M.D., in September of
 24 2002. Dr. Richardson restricted Plaintiff to sedentary work due to
 25 low back strain. (Ct. Rec. 24 at 17-19, referring to Tr. 168-169.)
 26 The Commissioner acknowledges that the ALJ did not discuss Dr.
 27 Richardson's opinion, but essentially argues that any error is
 28

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1 harmless because other substantial evidence supports the ALJ's
 2 assessed RFC. The other substantial evidence is the ALJ's rejection
 3 of an examining physician's RFC for light work, an RFC for medium
 4 work assessed by agency physicians (consistent with the RFC assessed
 5 by ALJ Riley), and Plaintiff's "extensive daily activities." (Ct.
 6 Rec. 27 at 7-8.)

7 On September 10, 2002, Dr. Richardson examined Plaintiff and
 8 assessed chronic low back pain. She was unable to rule out
 9 discogenic or degenerative disease pending x-ray results.¹ (Tr.
 10 167.) The parties acknowledge Dr. Richardson limited Plaintiff to
 11 no more than sedentary work. Later records show Dr. Richardson
 12 treated Plaintiff for acute muscle spasm on June 18, 2003,
 13 apparently triggered by Plaintiff moving rocks on his property.
 14 (Tr. 286.)

15 The Commissioner concedes that the ALJ fails to discuss Dr.
 16 Richardson's opinion. "[W]here the treating doctor's opinion is not
 17 contradicted by another doctor, it may be rejected only for 'clear
 18 and convincing' reasons." *Lester v. Chater*, 81 F.3d 821, 830 (9th
 19 Cir. 1995)(citing *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir.
 20 1991)). Even if the treating doctor's opinion is contradicted by
 21 another doctor, the Commissioner may not reject this opinion without
 22 providing "specific and legitimate reasons" supported by substantial

23
 24 ¹On September 10, 2002, disc space narrowing at L5-S1 with
 25 moderate surrounding bony spur formation was noted. (Tr. 333.) On
 26 September 19, 2003, x-rays showed marked narrowing of the L5-S1 disc
 27 space. (Tr. 282.) On September 26, 2003, moderate degenerative
 28 disc disease at C5-C6 is noted. (Tr. 278.)

1 evidence in the record for so doing. *Id.*, citing *Murray v. Heckler*,
 2 722 F.2d 499, 502 (9th Cir. 1983). The ALJ's failure to give at
 3 least specific and legitimate reasons supported by substantial
 4 evidence for rejecting treating Dr. Richardson's opinion is
 5 reversible error.

6 Even if the reasons offered by the Commissioner on appeal are
 7 deemed specific and legitimate, the court cannot affirm the decision
 8 of an agency on a ground not invoked by the agency in making its
 9 decision. *Pinto v. Massanari*, 249 F. 3d 840, 847-848 (9th Cir.
 10 2001), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

11 The court notes that Dr. Richardson was not alone in limiting
 12 Plaintiff to sedentary work based on his spinal problems. On
 13 February 27, 2003, David Tuning, PAC, also opined that Plaintiff
 14 could perform no more than sedentary work. (Tr. 293.) Mr. Tuning
 15 observed that although Plaintiff's ROM studies "are pretty good,"
 16 they are "not sustainable without exacerbation of back pain." (*Id.*)
 17 The ALJ does not address this opinion.

18 Mental impairments

19 Plaintiff alleges that the ALJ failed to properly weigh
 20 evidence of psychological impairment from "various treating mental
 21 health professionals," including assessments of marked limitations
 22 in five areas of functioning, and of moderate impairment in the
 23 ability to take care of self, including personal hygiene and
 24 appearance. (Ct. Rec. 24 at 19.) The Commissioner responds that
 25 the ALJ found these opinions unsupported and based on Plaintiff's
 26 discredited subjective complaints. (Ct. Rec. 27 at 10.) The
 27 Commissioner cites *Bayliss v. Barnhart*, 427 F.3d 1211, 1216-1217 (9th
 28

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1 Cir. 2005), and *Morgan v. Commissioner of Social Security Admin.*,
 2 169 F.3d 595, 601-602 (9th Cir. 1999), as supporting the
 3 Commissioner's reasoning.

4 Several mental health and medical providers describe
 5 Plaintiff's mental health impairments. On September 11, 2002,
 6 Plaintiff's therapist Rebecca Twohy, MSW, assessed personality
 7 disorder NOS, with dependent and antisocial features, and depressive
 8 disorder NOS. (Tr. 329.) She assessed several marked and moderate
 9 limitations, noted Plaintiff "makes impulsive decisions not always
 10 in his best interest," and opined that Plaintiff's history of
 11 substance abuse and institutionalization make it difficult to
 12 predict Plaintiff's ability to change. (Tr. 329-331.) On October
 13 29, 2002, Daniel Ferber, M.D., evaluated and began treating
 14 Plaintiff. (Tr. 200.) Dr. Ferber observed Plaintiff was poorly
 15 groomed and dressed. His affect was somewhat constricted and
 16 appeared dysphoric but not overtly depressed. (Tr. 201.) Dr. Ferber
 17 diagnosed dysthymia, early onset, moderate; polysubstance dependency
 18 in sustained full remission; conduct disorder, adolescent onset by
 19 history; and antisocial personality disorder. Dr. Ferber assessed
 20 a current GAF of 55² and began Plaintiff on medications. (Tr. 202.)
 21 Contrary to the DSM, the ALJ opined that an assessed GAF of 50 in
 22 October of 2002 "suggests the claimant's mental impairments result

23
 24 ²A GAF of 55 indicates moderate symptoms (e.g., flat affect and
 25 circumstantial speech, occasional panic attacks) or moderate
 26 difficulty in social, occupational, or school functioning (e.g., few
 27 friends, conflicts with peers and co-workers). DIAGNOSTIC AND
 28 STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Ed., (DSM-IV), at 32.

1 in at most, moderate limitations." (Tr. 20.)

2 In March of 2003, Martha Usatine, MSW, evaluated Plaintiff.
 3 She opined Plaintiff's hygiene, grooming and judgment were poor; in
 4 six areas of functioning, Plaintiff is moderately impaired, and in
 5 one area (physical complaints), markedly impaired. (Tr. 187-191.)

6 On August 16, 2003, Trula Thompson, M.D., evaluated Plaintiff
 7 overall as chronically mentally ill. (Tr. 181.) Dr. Thompson noted
 8 diagnoses of DDD, dysthymic disorder, and personality disorder NOS
 9 with dependent and antisocial features. She recommended 1-2 years
 10 of treatment. (*Id.*) On April 7, 2004, Shirley Roffe, M.D., pointed
 11 out that Dr. Faber last saw Plaintiff on March 10, 2003. Plaintiff
 12 admitted he had not been taking his prescribed psychotropic
 13 medication. He admitted relapsing into alcohol use around Christmas
 14 or New Year's but had been clean and sober for 3 months. Dr. Roffe
 15 observed Plaintiff was poorly groomed, his affect was serious with
 16 a very narrow range, and speech was monotone and flat. Plaintiff
 17 denied depression but reported being quite stressed. (Tr. 178-
 18 179.) When Dr. Roffe saw Plaintiff again two months later, on June
 19 29, 2004, she observed that he was fairly poorly groomed and
 20 exhibited a serious affect with a narrow range. (Tr. 240.) On
 21 August 21, 2006, Steven Woolpert, M.S., M.H.P., assessed Plaintiff
 22 as seriously disturbed, moderately impaired in nine areas, and
 23 markedly impaired in two areas. (Tr. 415-417.)

24 The ALJ's rejection of the opinions of the examining and
 25 treating professionals as "unsupported" and based on Plaintiff's
 26 discounted subjective complaints, is itself not supported by the
 27 record. Additionally, while the ALJ found Plaintiff's "mental
 28

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1 impairments result in only mild restriction of activities of daily
 2 living, moderate difficulties in maintaining social functioning, and
 3 moderate difficulties with concentration, persistence or pace," the
 4 ALJ did not include the assessed moderate limitations in his
 5 hypothetical questions to the VE. (*Cf.* Tr. 17 with Tr. 469-471.)

6 **B. Remedy**

7 There are two remedies where the ALJ fails to give adequate
 8 reasons for rejecting the opinion of a treating or examining doctor.
 9 The general rule, found in the *Lester* line of cases, is that "we
 10 credit that opinion as a matter of law." *Lester*, 81 F.3d at 834;
 11 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); *Hammock v.*
 12 *Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Under the alternate
 13 approach found in *McAllister v. Sullivan*, 888 F.2d 599 (9th Cir.
 14 1989), a court may remand to allow the ALJ to provide the requisite
 15 specific and legitimate reasons for disregarding the opinion. See
 16 also *Benecke*, 379 F.3d at 594 (court has flexibility in crediting
 17 testimony if substantial questions remain as to claimant's
 18 credibility and other issues). Where evidence has been identified
 19 that may be a basis for findings, but the findings are not
 20 articulated, remand is the proper disposition. *Salvador v.*
 21 *Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990) (citing *McAllister*);
 22 *Gonzales v. Sullivan*, 914 F.2d 1197 , 1202 (9th Cir. 1990). Having
 23 reviewed the record and the ALJ's conclusions, this court finds that
 24 the ALJ: 1) did not properly weigh the treating and examining
 25 professionals' opinions, and 2) found that Plaintiff suffered from
 26 moderate mental impairments but did not include them in the RFC
 27 given to the VE.

28

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1 The court expresses no opinion as to what the ultimate outcome
2 on remand will or should be. On remand, the ALJ will conduct a new
3 sequential evaluation, stating the reasons for the weight given to
4 the opinions of treating and examining medical and mental health
5 providers, and, if appropriate, include all determinable severe
6 impairments in hypothetical questions to the VE. Given Plaintiff's
7 documented history of substance abuse, if Plaintiff is found
8 disabled, the ALJ must conduct an analysis pursuant to *Bustamante v.*
9 *Massanari*, 272 F.3d 949 (9th Cir. 2001) to determine the effects of
10 substance abuse. Accordingly,

IT IS ORDERED:

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 23**) is
13 **GRANTED**. The matter is remanded to the Commissioner for additional
14 proceedings pursuant to sentence four 42 U.S.C. 405(q).

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 26**) is
16 **DENIED.**

17 3. An application for attorney fees may be filed by separate
18 motion.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Plaintiff and the file shall be **CLOSED**.

22 || DATED July 22, 2008.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE

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